ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of Customer Proprietary Network Information and other Customer Information	)	

FURTHER REPLY COMMENTS OF BELL ATLANTIC AND NYNEX

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FURTHER REPLY COMMENTS OF BELL ATLANTIC[1] AND NYNEX[2]

I. Introduction and Summary.

Contrary to the claims of the incumbent long distance companies, Section 222 is the only section of the Act that addresses the disclosure of customer proprietary network information ("CPNI") and the process that must be followed to obtain customer release of that information. In contrast, Section 272 has nothing to do with the process by which a Bell operating company ("BOC") or any other carrier obtains a customer's permission to use or disclose CPNI. Instead, Section 272 merely requires that, to the extent a BOC provides CPNI to its long distance affiliate, it must provide that CPNI on the same terms (such as price) to other

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[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; and Bell Atlantic-West Virginia, Inc.

[2] The NYNEX Telephone Companies are New York Telephone Company and New England Telephone and Telegraph Company.

long distance carriers that have also obtained the customer's consent. Even this latter requirement does not apply, however, when the CPNI is to be used in connection with the joint marketing of local and long distance services, whether by the BOC or by its long distance affiliate, under the express terms of Section 272(g)(3).

II. Section 222, Which Applies Equally To All Carriers, Governs Solicitation and Release of CPNI.

Section 222 specifies (1) the circumstances when CPNI is available without customer approval -- i.e., when used in the provision of the service from which it was derived or services necessary to, or used in the provision of, such service;[3] (2) when customer approval is needed for its use -- when used to provide other services;[4] (3) when CPNI must be released -- upon affirmative written customer request;[5] and (4) how approval for use of CPNI may be given during an inbound call -- orally, for the duration of that call.[6] That section, on its face, applies to all telecommunications carriers and imposes no greater or lesser restrictions on any carrier or class of carriers, whether they are Bell operating companies ("BOCs"), other incumbent local exchange carriers, competing local exchange carriers, competing exchange access providers, commercial mobile radio service providers, or interexchange carriers.[7] No other section of the

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[3] 47 U.S.C. § 222(c)(1). This provision applies to carriers and their authorized sales agents.

[4] ***Id.*** This provision applies to a carrier and any of its affiliates.

[5] 47 U.S.C. § 222(c)(2).

[6] 47 U.S.C. § 222(d)(3).

Communications Act addresses the process for obtaining customer authorization of the release of CPNI.

Solicitation of CPNI release is an activity that precedes the release of the information and is, therefore, part of the release process that is governed solely by the provisions of Section 222 that are summarized above. Without some sort of solicitation, customers will not know of their CPNI rights and would be unable to decide whether or not to release the information. Therefore, solicitation must be deemed an integral part of the approval and release process under Section 222, and that section, on its face, applies equally to all carriers.

III. The Limited Nondiscrimination Provisions of Sections 272 and 274 Cannot Be Read Into Section 222.

Nothing in Sections 272 and 274, provisions which apply only to the BOCs, addresses CPNI directly, and neither section even by implication governs the solicitation or release process.[8] As a result, Section 222, which on its face applies equally to all carriers, gives a BOC the same right to solicit its customers to allow use of CPNI by its interexchange or electronic publishing separate affiliate as an incumbent long distance carrier has to solicit on behalf of its local exchange or electronic publishing affiliate. Neither has an obligation to

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[7] Earlier House and Senate bills, which were not enacted, would have imposed the CPNI provisions only on the BOCs.

[8] The nondiscrimination provisions of Section 274 are narrowly restricted to inbound telemarketing and teaming arrangements. ***See*** 47 U.S.C. § 274(c)(2)(A) and (B).

include a competitor in any CPNI solicitation or to offer a "CPNI solicitation service," as some commenters claim.[9]

Instead, the only reasonable reading of the Act is that the nondiscrimination provision of Section 272 requires that, after a customer has approved release of CPNI pursuant to the provisions of Section 222, to the extent the customer has authorized its release to both an affiliate and a nonaffiliate of a BOC, the information must be provided to all carriers that are authorized to receive it on the same terms. This means, for example, if the BOC charges the nonaffiliate for access to CPNI, it must charge its affiliate the same price.

Even if the Commission were to find that CPNI solicitation is a Section 272 function, which it should not, then solicitation by the BOC to use CPNI to market or sell both local and long distance services must be considered an integral part of joint marketing, for which the nondiscrimination provision in Section 272(c)(1) does not apply.[10] As Sprint points out in its comments, CPNI is "information which is obviously useful to the marketing and sales efforts of providers of both local and interexchange services."[11] And Congress specifically allowed the BOCs and their 272 affiliates to engage in the joint marketing and sales of each other's services, unencumbered by the Section 272(c)(1) nondiscrimination requirements.[12] Indeed, as Bell Atlantic and NYNEX demonstrated in their earlier comments, CPNI is of significant importance

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[9] ***See, e.g.***, Comments of AT&T Corp. at 12 ("AT&T"), Comments of Cox Enterprises, Inc. at 6, Responses of the Telecommunications Resellers Association at 11-12 ("TRA").

[10] ***See*** 47 U.S.C. § 272(g)(3).

[11] Sprint Corp., Comments at 1.

[12] 47 U.S.C. § 272(g).

in allowing the BOCs to meet customer expectations for one-stop shopping for a complete range of telecommunications services and products. CPNI allows a carrier to target those customers who are most likely to be interested in particular new services and products, based upon their past purchasing habits, and to offer them packages of services tailored to their needs.[13] As a result, use of CPNI is by definition an integral part of the "joint marketing and sale" function that Section 272(g)(3) specifically exempts from the nondiscrimination provisions of Section 272(c)(1), and it would violate the Act for the Commission to apply those obligations to the use of CPNI.

The long distance incumbents nonetheless try to shoehorn the solicitation of permission to use CPNI into some "Never-Land" in between those two provisions in order to saddle the BOCs with restrictions that Congress never enacted. WorldCom, for example, asks the Commission to prohibit the BOCs entirely from soliciting CPNI release to their 272 affiliates.[14] As pointed out above, however, solicitation for release is a part of the release process and is governed entirely by Section 222, which applies equally to all carriers. WorldCom goes even further by arguing that, if the BOC (rather than the 272 affiliate) solicits such release, and a customer authorizes release only to the BOC's 272 affiliate, then any long distance carrier may obtain that information without customer consent.[15] Under WorldCom's argument, if a BOC or its 272 affiliate uses CPNI to engage in joint marketing of local and long distance services, as permitted under Section 272(g)(1) and (2), the public loses its privacy rights granted by Section

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[13] Further Comments of Bell Atlantic and NYNEX at 5.

[14] Further Comments of WorldCom at 9-10 ("WorldCom").

[15] ***Id.*** at 10-11.

222. That result would, of course, violate the Act unless the other long distance carrier first obtains the customer's consent. As the Competition Policy Institute points out, however, under Section 222, "[i]f the consumer indicates how his or her CPNI should be made available, that choice should prevail over the preferences of the carriers."[16]

AT&T claims that use of CPNI "on behalf of" or "for the benefit of" its 272 affiliate, such as when the BOC is acting as an agent of the affiliate, is subject to the nondiscrimination provision of Section 272(c)(1).[17] That provision, however, applies only to "the provision or procurement" of information and says nothing about agency or other arrangements in which no information changes hands. AT&T would, therefore, extend the reach of Section 272(c)(1) far beyond the explicit language of that provision.

Through convoluted arguments, AT&T and MCI also attempt to undermine the joint marketing provisions of Section 272(g). They first assert that the nondiscrimination provisions of Section 272(c) should be read back into Section 222, so that however approval for release of CPNI to a BOC's Section 272 affiliate is obtained -- opt out, oral consent, or written consent -- approval for release to third parties must be allowed in the same way.[18] AT&T -- but not MCI -- then claims that release of CPNI to third parties always requires prior written consent. Therefore, AT&T concludes, release to the affiliate also requires prior written consent.[19]

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[16] Further Comments of the Competition Policy Institute at 1.

[17] AT&T at 6.

[18] ***Id.*** at 6-7, Further Comments of MCI Telecommunications Corporation at 21-22 ("MCI").

[19] AT&T at 6-7.

These arguments fail for two reasons. First, there is no statutory basis for reading Section 272(c) into Section 222. As discussed above, Section 222 is the only section that addresses approval for release of CPNI, and that section applies equally to "[e]very telecommunications carrier."[20] Therefore, if the Commission were to find, as it should, that release of CPNI to an affiliate may be through one-time notification and opt out, that finding applies equally to all affiliates of the BOCs and of all other carriers. Second, if the Commission should find that release of CPNI is addressed in Section 272, which it should not, AT&T's and MCI's readings would be inconsistent with the joint marketing provisions of that section. When engaging in joint marketing of each other's services under Section 272(g)(1) or (2), Section 272(g)(3) specifies that the BOC and its 272 affiliate are not subject to the nondiscrimination provision of Section 272(c). The incumbent long distance carriers' approach would use the nondiscrimination provision to deprive the BOC and its affiliate of access to BOC CPNI when engaging in joint marketing, in direct contravention of Section 272(g)(3).

In its own additional attempts to undermine the statutory provisions, MCI puts forth three more invalid arguments. First, MCI claims that Congress intended to apply more stringent Section 222 requirements to the BOCs than to other carriers, citing Senate Report language.[21] MCI goes on to argue that the Senate report language is determinative of Congressional intent, because most of the Senate provisions were incorporated into Section 222.[22] MCI conveniently ignores the fact that the privacy provisions of the Senate bill applied

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[20] 47 U.S.C. § 222(a).

[21] MCI at 6.

[22] ***Id.***

only to the BOCs, while Section 222 as enacted applies to all telecommunications carriers. Therefore, the Senate language that states that the privacy section restricts only the BOCs has no significance in showing final Congressional intent.

Second, MCI contends that Sections 201(b) and 202(a) of the Act negate Section 272(g)(3) and apply nondiscrimination requirements to release of CPNI in connection with joint marketing.[23] MCI is wrong. Sections 201(b) and 202(a) apply only to common carrier telecommunications services, i.e., transmission by wire or radio.[24] As the Telecommunications Resellers Association points out, CPNI is not a common carrier service.[25] If it were, MCI and other carriers would have the same obligation to provide CPNI to all persons upon request, a requirement that would violate the privacy provisions of Section 222 which give customers control over release of CPNI pertaining to their services.

Third, MCI argues that the Commission in interpreting Section 222 should ignore the desires and expectations of the public for one-stop shopping by rejecting the BOCs' proposals to allow one-time notice and opt out procedures for release of CPNI to affiliates.[26] Section 222, however, "strives to balance both competitive and consumer privacy interests with respect to CPNI."[27] As discussed above, and as the record shows, customers do not expect to have to sign forms to give any affirmative approval before a single firm may use information on

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[23] ***Id.*** at 22.

[24] ***See*** 47 U.S.C. § 153(33), (43), (46), (51).

[25] TRA at 9.

[26] MCI at 8-10.

[27] H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 205 (1996).

one service to sell another. The Commission cannot ignore consumer expectations when interpreting a consumer protection section of the Act, but that is precisely what MCI asks.[28]

IV. All Telecommunications Services Should Be Placed In a Single "Basket" For CPNI Purposes.

Although the bulk of AT&T's arguments are flawed for the reasons addressed above, it does make one valid point. AT&T correctly argues that the Commission should place all telecommunications services into a single basket and allow a carrier and its affiliates to use CPNI to provide all such services without customer approval.[29] As AT&T shows, customers expect that a telecommunications carrier should be able to provide any telecommunications service on an integrated basis, through a single point of contact. The general public does not differentiate among intraLATA and interLATA or wired and wireless services. Customers want to place telephone calls to another point, and they do not want to have to deal with different regulatory standards based upon artificial distinctions of distance or transmission medium. Therefore, the Commission should define all telecommunications services into the same "basket" for Section 222 purposes, as AT&T proposes. Under Section 222, that same standard must apply equally to all carriers.

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[28] MCI also attacks the survey of privacy expectations that Pacific Telesis submitted, solely on the basis that it failed to ask certain flagrantly leading questions that MCI would have posed in an effort to bias the results. MCI at 7. The Commission should give significant weight to Pacific's balanced study conducted by noted authorities in the privacy field and dismiss out of hand MCI's allegation that the survey was dishonest because it did not include MCI's types of leading questions.

[29] AT&T at 2-4.

V. Use of Subscriber Names and Addresses for Directory Delivery Is Not Germane To This Proceeding.

Directory Dividends raises a specific factual dispute it is having with Bell Atlantic.[30] Directory Dividends formerly served as a sales agent for Bell Atlantic's Direct Values program - a directory "ride along" service in which advertising materials are distributed by directory publishers along with their printed yellow page directories.[31]

Directory Dividends appears to argue that Bell Atlantic Directory Services, Inc. ("DSI") somehow is violating the Act's CPNI requirements by failing to deliver Directory Dividends' "ride-along" materials with its printed directories and by not making subscriber names and addresses available to Directory Dividends for direct marketing purposes that have nothing to do with telephone directories. Even if Directory Dividend's claim were valid, which it is not, this broad rulemaking proceeding is not the proper forum to raise a specific factual dispute, and its comments should be disregarded.

In any event, Directory Dividends' contention is wrong both on the facts and the law. First, the activities of DSI that Directory Dividends alleges violate the nondiscrimination provisions are not those covered by either Section 272 or 274 -- they involve only the delivery of printed directories. Second, the information that Directory Dividends wants Bell Atlantic to provide it is customer names and addresses, which, under the Act, is not CPNI.[32] And nothing

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[30] Comments of Directory Dividends, Inc.

[31] Bell Atlantic terminated its contract with Directory Dividends in September 1996.

[32] 47 U.S.C. § 222(f)(1) (CPNI "does not include subscriber list information").

in the Act requires Bell Atlantic to provide the names and addresses to third parties for marketing purposes.[33]

Directory Dividends also claims that the information is aggregated CPNI, which must be disclosed to third parties under certain circumstances.[34] Aggregated CPNI, however, is defined as information that does not contain customer identities or characteristics.[35] The data in question include subscriber names and addresses, which clearly include such customer information. Therefore, the information does not qualify as aggregated CPNI, and the provisions of Section 222(c)(3) are inapplicable.

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[33] ***See*** 47 U.S.C. § 222(e).

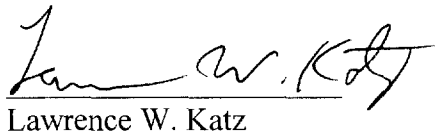
[34] ***See*** 47 U.S.C. § 222(c)(3).

[35] 47 U.S.C. § 222(f)(2).

VI. Conclusion

Accordingly, the Commission should interpret the CPNI provisions of the Act in the manner Bell Atlantic and NYNEX described in their Further Comments and deny the attempts of some parties to distort the clear statutory language to their benefit.

Respectfully Submitted,



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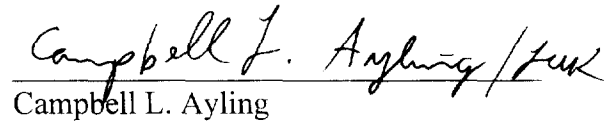

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March 27, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 1997 a copy of the foregoing "Further Reply Comments of Bell Atlantic and NYNEX" was served by hand on the parties on the attached list.

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